IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELATE CIVIL JURISDICTION

WRIT PETITION NO.1471 OF 1999

Mrs.Supriya Hemant Mhapankar
Aged 32 years, Occ: Service
R/o. Kailash Dham Co-op. Hsg. Society
Block No.110, 3rd floor, Wadawali
Section, Ambernath(E), Dist: Thane. ..Petitioner

Vs.

1. The State of Maharashtra
   through the Secretary, School
   Education Department,
   Mantralaya, Mumbai-400 032.

2. The Education Officer (Secondary)
   Zilla Parishad, Thane.

3. The Secretary
   Shishu Vikas Sanstha
   570, Smruti Kher Section,
   Ambernath, Dist: Thane.

4. The Head Mistress
   Gokhale Rahalkar Vidyalaya
   (Secondary),
   Kher Section, Ambernath, Dist:Thane.

5. Mrs. Ashwini Khade
   Working as Clerk with
   Gokhale-Rahalkar Vidyalaya (Secondary)
   Kher Section, Ambernath, Dist:
   Thane

6. Education Officer (Primary)
   Zilla Parishad, Thane. ..Respondents

Mr.N.V.Bhandiwadkar for Petitioner

CORAM: F.I. REBELLO &
S.P. KUKDAY, JJ.
DATE: 6TH MAY, 2005.

JUDGMENT (PER S.P.KUKDAY,J.)

. Briefly stated the relevant are that Respondent No.3 Shishu Vikas Sanstha runs Gokhale

Rahalkar Vidyalaya at Ambernath, Dist: Thane. In the year 1988 Respondent No.3 was running primary unaided school having classes from Ist to VIIth Standards. During that period as the number of students was less than 500 post of Clerk was not admissible. However, for meeting the exigencies, Respondent No.3 advertised post of Clerk and by process of selection selected Petitioner herein for the said post. The Petitioner was appointed as a Clerk in Primary Section of the Respondent School in a clear vacancy with effect from 9th June, 1988 for a salary of Rs.260/- per month. Subsequently as a result of natural growth a Secondary Section was added and it was decided that there should be a seperate Clerk for Secondary Section. Petitioner, therefore, made a request that she should be considered for this post as a post of Clerk for primary section was not a sanctioned post. Her request was ignored and Respondent No.5 came to be appointed without following prescribed procedure for recruitment. As the Respondent No.3 did not consider her request, Petitioner served the management with legal notice dated 15th April, 1998 calling upon Respondent No.3 to consider her claim. Copy of the notice was forwarded to Respondent No.2 with a request not to approve appointment of Respondent No.5. However, the request of the Petitioner was not considered hence, this Petition.

2. Shri S.R.Bhadkamkar, a Secretary of Shishu Vikas Sanstha/Respondent No.3, has filed an affidavit in reply. According to Respondent No.3, the Petitioner was on leave from 2nd December, 1999 to 31st December, 1999. During her leave period Respondent No.5 came to be appointed on a temporary basis. After Secondary Section was opened, Petitioner was asked to work there as a Clerk. By her letter dated 15th July, 1997 the Petitioner had made it clear that she should be appointed to a post which would receive sanction earlier and declined to work on temporary post of a Clerk for Secondary Section. Hence, Respondent No.5 was appointed to that post. However, after the Secondary Section started receiving grant in aid to the tune of 25%. Petitioner started making her claim to this post. The appointment of Respondent No.5 in Secondary Section Marathi School has been approved by the Education Department and she is working as a permanent Clerk in the school. Not only that the Petitioner is not working in the school since June, 1999. She has misappropriated funds from the school thus salary is not paid to her from March, 1999 onwards on account of her absence. As the Petitioner has remained absent Mr.Sanjay Deshmukh is now appointed as Junior Clerk in the primary section. In view of these facts the Petitioner has

no right to claim an appointment as a Clerk of the Secondary Section of the School. According to Respondent No.3 the Petition deserves to be dismissed.

3. In this case the Petitioner has challenged appointment of respondent NO.5 because it was not done by following the procedure prescribed under the provisions of The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (herein after referred as M.E.P.S. Act, 1977) and Maharashtra Employees Private Schools Rules, 1981 (herein after referred as M.E.P.S. Rules, 1981). Therefore, it is not necessary to dilate on the other aspects. It is pertinent to note that by order dated 10th June, 1999 this Court had made it clear at the time of admission of the Petition that appointment of Respondent No.5 will be subject to the result of the Petition. For the purpose of this Petition Section 5 of M.E.P.S.Act is relevant: As per this Section the Management shall, as soon as possible, fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy. Sub Section (5) lays down that even a temporary vacancy is to be filled by appointing a person duly qualified to fill such vacancy. Rule 9 of M.E.P.S.Rules, 1981 prescribes procedure to be

followed for making appointments. Appointments of non teaching staff are to be made by the School Committee.

4. In the beginning as strength of the students in primary section was less than 500, post of Junior Clerk was not sanctioned. Subsequently a Secondary Section was opened on account of the natural growth. In the beginning post of a Clerk was not admissible for Primary Section, and secondary section therefore, appointment of Respondent No.5 and Petitioner were purely on ad-hoc basis. Learned Counsel for the Petitioner contends that after the post was sanctioned by the Education Department it was obligatory for Respondent No.3 to follow the procedure as required by Section 5 of the M.E.P.S.Act, 1977. As this has not been done appointment of Respondent No.5 will have to be set aside. According to learned Counsel for Respondent No.3, Respondent No.5 was working in the school since 1993 therefore, proposal for her confirmation forwarded to the Education Department and was approved by the Education Officer, therefore, her appointment can not be challenged. Time and again this issue has been dealt with by the Courts. A practice of filling in the vacancies without giving an advertisement and giving a backdoor entry to the aspirants is always depricated. In **the matter of**

A.Umarani Vs. Registrar, Cooperative Societies & Ors.((2004)7 S.C.C. 112). Apex Court has observed in paragraph Nos. 39 & 40 that:

> . "Regularisation, in our considered opinion, is not and cannot be the mode of recruitment by any "State" within the meaning of Article 12 of the Constitution of India or any body or authority governed by a statutory Act or the Rules framed thereunder. It is also now well settled that an appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation.
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> . It is equally well settled that those who came by back door should go through that door."

5. Having regard to the principles laid down by the Apex Court contentions raised by learned Counsel for Petitioner will have to be sustained. As procedure prescribed Section 5 of the M.E.P.S.Act, 1977 and Rule 9 of the M.E.P.S.Rules, 1981 is not

followed while making appointment of Respondent No.5, her appointment will have to be set aside. However, to ensure that the work of the institution does not suffer, Respondent No.5 be continued in the post till the post is advertised and filled in by following necessary procedure. We therefore, allow the Petition to this extent.

6. In the light of the above, appointment of Respondent No.5 is hereby set aside. The post be advertised and then filled in by following due procedure prescribed by the Maharashtra Employees of Private Schools (Condition of services) Regulation Act, 1977 and the Rules made thereunder. Respondent NO.5 shall continue in service till regular appointment is made. The Petitioner, Respondent NO.5 and others would be eligible to compete if they so desire. The process of appointment be completed within four months.

. Rule be made absolute in terms of the above observations.

(F.I.REBELLO,J.)

(S.P. KUKDAY,J.)